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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 MARY ALEXANDER,

11 Plaintiff,

12 v.

13 AURORA LOAN SERVICES, a foreign  
14 limited liability company; and  
15 CHRISTOPHER HOBSON, INC., a  
16 California Corporation qualified to do  
17 business in Nevada, d/b/a Franklin  
Financial and DOES I-V and ROES VI-X.

Defendants.

Case No. 2:09-CV-1790-KJD-LRL

**ORDER**

18 Presently before the Court is Defendant Aurora Loan Services' ("Aurora") Motion to Dismiss  
19 (#6). Plaintiff filed a response in Opposition (#10) to which Aurora replied (#13). Defendant  
20 Franklin Financial ("Franklin") filed a Joinder in Motion and Motion to Dismiss (#11) to which  
21 Plaintiff filed a supplement in Opposition (#12). Also before the Court is Plaintiff's Motion for  
22 Preliminary Injunction (#14). Franklin filed a response in Opposition (#15) to which Plaintiff replied  
23 (#17).

24 **I. Background**

25 Plaintiff Mary Alexander purchased real property located at 1090 Bootspur Drive, Henderson,  
26 Nevada on or about April 12, 2006, for \$374,900. To finance the purchase of the property, Plaintiff

1 obtained a mortgage loan (“the Loan”) in the amount of \$352,000 from Franklin. Plaintiff signed a  
2 promissory note and executed a deed of trust to secure the Loan.

3 After Plaintiff’s attempts with Aurora to modify the terms of the Loan failed, Plaintiff  
4 notified Aurora and Franklin on or about May 27, 2009, that she was rescinding the Loan and  
5 thereafter stopped making payments in or around July 2009. As a result of Plaintiff’s default on the  
6 Loan, non-judicial foreclosure proceedings commenced, including the recording of a Notice of  
7 Breach and Default and Election to Cause Sale of Real Property on November 13, 2009.

8 On August 11, 2009, Plaintiff filed the present Complaint in Nevada state court seeking  
9 compensatory damages, injunctive relief, attorney’s fees, and costs. On September 9, 2009, Aurora  
10 removed this case on the basis of diversity and federal question jurisdiction and moved to dismiss  
11 Plaintiff’s Complaint for failure to state a claim upon which relief can be granted. On November 13,  
12 2009, Franklin also filed a motion to dismiss. Subsequently, on February 2, 2010, Plaintiff filed the  
13 present Motion for Preliminary Injunction.

## 14 **II. Standard for Motion to Dismiss**

15 In considering a motion to dismiss, “all well-pleaded allegations of material fact are taken as  
16 true and construed in a light most favorable to the non-moving party.” Wyler Summit Partnership v.  
17 Turner Broadcasting System, Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation omitted).  
18 Consequently, there is a strong presumption against dismissing an action for failure to state a claim.  
19 See Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citation omitted).

20 “To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted  
21 as true, to ‘state a claim to relief that is plausible on its face.’” Ashcroft v. Iqbal, 129 S. Ct. 1937,  
22 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Plausibility, in the  
23 context of a motion to dismiss, means that the plaintiff has pleaded facts which allow “the court to  
24 draw the reasonable inference that the defendant is liable for the misconduct alleged.” Id.

25 The Iqbal evaluation illustrates a two prong analysis. First, the Court identifies “the  
26 allegations in the complaint that are not entitled to the assumption of truth,” that is, those allegations

1 which are legal conclusions, bare assertions, or merely conclusory. Id. at 1949-51. Second, the  
 2 Court considers the factual allegations “to determine if they plausibly suggest an entitlement to  
 3 relief.” Id. at 1951. If the allegations state plausible claims for relief, such claims survive the motion  
 4 to dismiss. Id. at 1950.

### 5 **III. Motion to Dismiss Analysis**

6 Plaintiff asserts seven causes of action in her Complaint against Defendants: (1) deceptive  
 7 trade practices; (2) unfair lending practices under state statute; (3) breach of contract and failure to  
 8 act in good faith; (4) violations of TILA; (5) preliminary and permanent injunctive relief; (6)  
 9 declaratory relief that Plaintiff was given an unfair loan that should be rescinded and declared as null  
 10 and void; and (7) breach of the implied covenant of good faith and fair dealing. Defendants have  
 11 moved to dismiss each cause of action.<sup>1</sup>

#### 12 **A. Deceptive Trade Practices**

13 Defendants have moved to dismiss Plaintiff’s claim under Nevada’s Deceptive Trade  
 14 Practices Act, N.R.S. § 598, asserting that Plaintiff cannot state a claim under the Act, since it  
 15 applies to goods and services and not real estate loan transactions. The Court agrees.

16 N.R.S. § 598.0923(3), the provision upon which Plaintiff bases her claim, provides that “[a]  
 17 person engages in a ‘deceptive trade practice’ when in the course of his or her business or occupation  
 18 he or she knowingly . . . [v]iolates a state or federal statute or regulation *relating to the sale or lease*  
 19 *of goods or services.*” N.R.S. § 598.0923(3)(2009)(emphasis added). Here, Plaintiff’s claim deals  
 20 with the sale or lease of real property, not goods or services; therefore, this statute does not provide  
 21 an avenue for relief to Plaintiff. The Nevada legislature adopted a separate statute dedicated solely to  
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23 1. The Court will examine Plaintiff’s fifth cause of action for preliminary and permanent injunctive relief  
 24 separately in the section dealing with Plaintiff’s Motion for Preliminary Injunction. See infra p.7. Also, the  
 25 Court will examine Plaintiff’s seventh cause of action for breach of the implied covenant of good faith and fair  
 26 dealing in conjunction with Plaintiff’s third cause of action for breach of contract and failure to act in good faith.  
See infra p. 5.

lending practices, further supporting the statutory construction that real estate transactions are not covered under N.R.S. § 598.0923(3). See generally N.R.S. § 598D (2003). Accordingly, the Court dismisses Plaintiff's claim arising under Nevada's Deceptive Trade Practices Act.

#### B. Unfair Lending Practices

Defendants have moved to dismiss Plaintiff's claim arising under Nevada's Unfair Lending Practices Act, N.R.S. § 598D, *et. seq.*, asserting that she cannot state a claim under the Act, because the Loan does not meet the definition of a home loan. The Court finds that the Loan does not meet the definition of "home loan" under the applicable code sections.

N.R.S. § 598D.100(1)(b) of the 2003 Unfair Lending Practices Act, in effect at the time of the Loan, provided in relevant part:

It is an unfair lending practice for a lender to . . . [k]nowingly make a home loan to a borrower based solely upon the equity of the borrower in the home property and without determining that the borrower has the ability to repay the home loan from other assets, including, without limitation, income.

The 2003 Act defined a "home loan" as a "consumer credit transaction" that (1) "is secured by a mortgage loan which involves real property located within [Nevada]" and (2) "[c]onstitutes a mortgage under §152 of the Home Ownership and Equity Protection Act of 1994 [("HOEPA")]" and the regulations pursuant to HOEPA, including 12 C.F.R. §226.32. See N.R.S. § 598D.040 (2005).

Section 152 of HOEPA defines a mortgage as "[a] consumer credit transaction that is secured by the consumer's principal dwelling, other than a residential mortgage transaction . . ." 15 U.S.C. § 1602 (aa)(1). A "residential mortgage transaction" is "a transaction in which a mortgage, deed of trust . . . or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling." 15 U.S.C. § 1602 (w).

In this action, Plaintiff's loan is a "residential mortgage transaction" and, therefore, is not protected by the Unfair Lending Practices Act. Id. Plaintiff correctly asserts that the 2007 amendments changed the definition of "home loan." (See Dkt. #2, Compl. 5) However, such amendments did not become effective until October 1, 2007, approximately a year and one-half after

1 Plaintiff secured the Loan. In Nevada, unless the legislature clearly expresses that a law should apply  
 2 retroactively, the statute will only apply prospectively. See Valdez v. Employers Ins. Co., 162 P.3d  
 3 148, 154 (Nev. 2007)(*en banc*). The 2007 amendments contain no express retroactivity language.  
 4 Therefore, since the Loan did not meet the applicable definitions when it was consummated in April  
 5 2006, the Court dismisses Plaintiff's claim arising under the Nevada Unfair Lending Practices Act.

#### 6 C. Breach of Contract and Failure to Act in Good Faith

7 In order for Plaintiff to sustain a claim for breach of contract, she must show (1) the existence  
 8 of a valid contract, (2) a breach by defendant, and (3) damage as a result of the breach. See Saini v.  
 9 Int'l Game Tech., 434 F. Supp.2d 913, 919-20 (D. Nev. 2006)(citing Richardson v. Jones, 1 Nev.  
 10 404, 405 (Nev. 1865)). Additionally, under Nevada law, "[e]very contract imposes upon each party a  
 11 duty of good faith and fair dealing in its performance and execution." A.C. Shaw Constr. v. Washoe  
 12 County, 784 P.2d 9 (Nev. 1989) (quoting Restatement (Second) of Contracts § 205). "[W]hen one  
 13 party performs a contract in a manner that is unfaithful to the purpose of the contract . . . damages  
 14 may be awarded against the party who does not act in good faith." Hilton Hotels v. Butch Lewis  
 15 Prods., 808 P.2d 919, 923 (Nev. 1991).

16 Here, Plaintiff's claim fails because she does not allege facts indicating that Defendants were  
 17 "unfaithful to the purpose of the contract." See Hilton Hotels, 808 P.2d at 932. Instead of asserting  
 18 that Defendants violated the terms of the Loan, Plaintiff's complaint merely alleges that Defendants  
 19 failed to disclose information regarding the Loan and were unwilling to negotiate acceptable terms.  
 20 Furthermore, even assuming these allegations were true, they occurred *before* the contract was  
 21 entered into and a party cannot breach the covenant of good faith and fair dealing before a contract is  
 22 formed. See Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc., 157 F.3d 933, 941 (2d Cir.  
 23 1998) ("an implied covenant relates only to the performance of obligations under an extant contract,  
 24 and not to any pre-contract conduct"). Plaintiff's sole allegation regarding conduct after the contract  
 25 was formed is that Defendants refused to renegotiate the terms of the Loan. Defendants, however,  
 26 were not required to alter the terms of the Loan.

1 Furthermore, Plaintiff's claim fails because the remedies she seeks under N.R.S. § 104.9625  
2 apply to secured transactions, not real estate transactions. See N.R.S. § 104.9109 (4)(k)(2005)(noting  
3 that "[t]his article does not apply to . . . the creation or transfer of an interest in or lien on real  
4 property . . ."). Therefore, the Court dismisses Plaintiff's claim for breach of contract and failure to  
5 act in good faith. Plaintiff further claims Defendants breached the implied covenant of good faith and  
6 fair dealing by not providing market loans to her and by failing to modify the Loan. For the reasons  
7 previously given in this section, the Court dismisses this claim also.

#### 8 D. Violations of TILA

9 Plaintiff claims that Defendants failed to provide her with timely written disclosures of  
10 financing terms. Defendants have moved to dismiss Plaintiff's TILA claim, asserting that it is barred  
11 by the statute of limitations. The Court finds that Plaintiff's TILA claim is time-barred.

12 TILA provides a one-year statute of limitations period for claims for civil damages and a  
13 three-year period for rescission. See 15 U.S.C. § 1640(e); 1635(a) and (f). The statute of limitations  
14 begins to run from the date of closing on the transaction. See King v. California, 784 F.2d 910, 915  
15 (9th Cir. 1986). However, under King, equitable tolling is available to stay the statute of limitations  
16 if Plaintiff has been prevented from discovering any potential claims for fraud against Defendants.  
17 See id.

18 Here, the Loan closed on or about April 6, 2006. Thus, a claim for damages should have been  
19 made no later than April 6, 2007. Rescission should have occurred no later than April 6, 2009.  
20 Plaintiff filed this action on August 11, 2009 and claims to have notified the lender of her action  
21 rescinding the Loan on or about May 27, 2009, both dates well after the applicable statute of  
22 limitations. Additionally, Plaintiff cannot seek rescission under § 1635 because the statute expressly  
23 states that these provisions do not apply to "residential mortgage transactions." A residential  
24 mortgage transaction is defined in 15 U.S.C. § 1602(w) as a "transaction in which a mortgage . . .  
25 interest is created or retained against the consumer's principal dwelling." See also 12 C.F.R. §  
26 226.2(a)(24). Finally, equitable tolling would not stay the statute of limitations here because Plaintiff

has not adequately alleged facts showing that she was prevented from discovering this claim earlier.<sup>2</sup> Accordingly, the Court dismisses Plaintiff's claim for violation of TILA.

#### E. Declaratory Relief

"The court may . . . render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would . . . terminate the uncertainty or controversy giving rise to the proceeding." N.R.S. § 30.080 (2009). Moreover, the [declaratory judgment] may be either affirmative or negative in form and effect. See N.R.S. § 30.030 (2009). However, in this action a declaratory judgment is not appropriate because there is no "uncertainty or controversy giving rise to the proceeding" to "terminate." N.R.S. § 30.080 (2009). All of Plaintiff's claims have thus far been dismissed, therefore the Court cannot grant declaratory relief based on Plaintiff's failed claims. Furthermore, while Plaintiff seeks a declaration from the Court that she was given an unfair loan that should be rescinded, it has already been shown that rescission is no longer available and Plaintiff voluntarily agreed to the "unfair" Loan. (See Dkt. #2, Compl.¶ 12-22)

#### IV. Motion for Preliminary Injunction Analysis

Also before the Court is Plaintiff's Motion for Preliminary Injunction (#14). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (quotations and citations omitted). A preliminary injunction is appropriate where a plaintiff demonstrates "either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in [his] favor." Clear Channel Outdoor Inc. v. City of Los Angeles, 340 F.3d 810, 813 (9th Cir. 2003) (quoting Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999)).

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2. Even if true that Aurora and Franklin worked together in the origination of the Loan, the equitable tolling requirements have still not been satisfied since Plaintiff fails to allege specific facts showing that she was prevented from discovering potential claims for fraud.

1 A district court must also consider whether the public interest favors issuance of the  
 2 injunction. See Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992); see also,  
 3 Chisom v. Roemer, 853 F.2d 1186, 1189 (5th Cir. 1988). This alternative test for injunctive relief  
 4 has also been formulated as follows: a plaintiff is required to establish “(1) a strong likelihood of  
 5 success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not  
 6 granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest  
 7 (in certain cases).” Johnson v. Cal. State Bd. of Accountancy, 72 F.3d 1427, 1430 (9th Cir. 1995)  
 8 (internal quotation marks omitted). This analysis creates a continuum: the less certain a district court  
 9 is of the likelihood of success on the merits, the more plaintiffs must convince the district court that  
 10 the public interest and balance of hardships tip in their favor. See Fund for Animals, Inc., 962 F.2d at  
 11 1400.

12 More specifically, the Ninth Circuit has described the relationship between success on the  
 13 merits and irreparable harm as “a sliding scale in which the required degree of irreparable harm  
 14 increases as the probability of success decreases.” Prudential Real Estate Affiliates, Inc. v. PPR  
 15 Realty, Inc., 204 F.3d 867, 874 (9th Cir. 2000). To reach this sliding scale analysis, however, a  
 16 moving party must, at an “irreducible minimum,” demonstrate some chance of success on the merits.  
 17 Arcamuzi v. Cont’l Air Lines, Inc., 819 F.2d 935, 937 (9th Cir.1987).

18 Here, Plaintiff’s complaint is subject to dismissal. Specifically, Plaintiff’s strongest claims  
 19 under the Nevada Unfair Lending Practices Act must be dismissed, because the amendment to the  
 20 Act does not retroactively apply to the Loan at issue in this case. Accordingly, Plaintiff’s Motion for  
 21 Preliminary Injunction is denied.

## 22 V. Conclusion

23 Accordingly, **IT IS HEREBY ORDERED** that Defendant Aurora’s Motion to Dismiss (#6)  
 24 is **GRANTED**;

25 **IT IS FURTHER ORDERED** that Defendant Franklin’s Joinder in Motion and Motion to  
 26 Dismiss (#11) is **GRANTED**;



1       **IT IS FURTHER ORDERED** that Plaintiff's Motion for Preliminary Injunction (#14) is  
2 **DENIED.**

3       **IT IS FURTHER ORDERED** that the Clerk of the Court enter **JUDGMENT** for  
4 Defendants and against Plaintiff.

5       DATED this 8th day of July 2010.

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8 Kent J. Dawson  
9 United States District Judge  
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